No. 89-453

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN WOMEN IN RADIO AND TELEVISION, INC. IN SUPPORT OF RESPONDENTS

RICHARD P. HOLME*
MARION C. FORTNER
DAWSON R. GARRITTANO
DAVIS, GRAHAM & STUBBS
1300 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 463-8400

Attorneys for Amicus Curiae

*Counsel of Record

March 6, 1990

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Communications Commission's policy of awarding qualitative enhancements for female ownership in comparative licensing proceedings violates equal protection guaranteed under the Fifth Amendment of the United States Constitution.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
INTEREST OF THE AMICUS CURIAE	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Constitutionality Of The FCC's Female Enhancement Should Not Be Addressed	4
II. Awarding Enhancement Merit To Applicants Proposing Ownership By Females Who Will Occupy Management Positions Is Constitutional	5
A. The Female Enhancement Merit Complies With Due Process If It Serves An Important Governmental Objective And Is Substantially Related To The Achievement Of That Objective	5
B. Advancement Of A Diversity Of Viewpoints In The Limited Broadcast Spectrum Is Consistent With The First Amendment And Is An "Important Governmental Objective"	6
C. The Female Enhancement Merit Is A Means Substantially Related To The Achievement Of The Objective	10
1. Structural Solutions Used By The FCC Are Familiar And Constitutionally Acceptable	11
2. The FCC Examines A Variety Of Factors In Comparative License Proceedings	12

3. The Female Enhancement Merit Substantially Relates To Achieving A Diversity Of Viewpoints	17
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	Pages
Associated Press v. United States, 326 U.S. 1 (1945)	6
Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971)	8
City of Richmond v. J.A. Croson Co., ___ U.S. ___, 109 S. Ct. 706 (1989)	22
Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94 (1973)	21
Craig v. Boren, 429 U.S. 190 (1976)	5
Crosthwait v. FCC, 584 F.2d 550 (D.C. Cir. 1978)	22
FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978)	7,8
Frontiero v. Richardson, 411 U.S. 677 (1973)	9
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)	7,8
Heckler v. Mathews, 465 U.S. 728 (1984)	5,6,18
Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 107 S. Ct. 1442 (1987)	23,24
Muir v. Alabama Educational Television Comm'n, 688 F.2d 1033 (5th Cir. 1982) (*en banc*)	19
NAACP v. FPC, 425 U.S. 662 (1976)	17
National Broadcasting Co. v. United States, 319 U.S. 190 (1943)	6,7
National Organization for Women v. FCC, 555 F.2d 1002 (D.C. Cir. 1977)	11
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	7
Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)	21,22,23,24
Rostker v. Goldberg, 453 U.S. 57 (1981)	5

Table of Authorities Continued

	Page
TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974)	8,11,15,20
West Michigan Broadcasting Corp. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)	11,15,22
Winter Park Commun., Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989)	4,19
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)	20,22
Administrative Decisions	
Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings, 2 F.C.C.2d 667 (1966)	16
Azalea Corp., 31 F.C.C.2d 561 (1971)	22
Bott, Richard P., III, 4 F.C.C. Rcd 4924 (Rev. Bd. 1989)	14
Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858 (1976)	19
Equal Employment Program, 32 F.C.C.2d 708 (1971)	9,17
Miracle Strip Communications, Inc., 4 F.C.C. Rcd 5064 (1989)	15,16
Omaha TV 15, Inc., 4 F.C.C. Rcd 730 (1988)	14
Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965)	11,13,14,15,16
Radio Jonesboro, Inc., 96 F.C.C.2d 1106 (Rev. Bd. 1984), *aff'd* 100 F.C.C.2d 941 (1985)	15
Ramon Rodriquez et al., 4 F.C.C. Rcd 6817 (Rev. Bd. 1989)	13

Table of Authorities Continued

Page

Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 F.C.C. Rcd 3853 (1989) 16

Snake River Valley Television, Inc., 26 F.C.C.2d 380 (Rev. Bd. 1970) 13

Stanly Group Broadcasting, Inc., 3 F.C.C. Rcd 5017 (Rev. Bd. 1988) 14,15

Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978) 11

Van Buren Community Service Broadcasters, Inc., 87 F.C.C.2d 1018 (Rev. Bd. 1981) 15

Vela Broadcasting Co., 2 F.C.C. Rcd 3663 (Rev. Bd. 1987) 16

Waters Broadcasting Corp., 91 F.C.C.2d 1260 (1982) 15

WPIX, Inc., 68 F.C.C.2d 381 (1978) 11

Constitution

Constitution of the United States of America
Fifth Amendment 5

Statutes

47 U.S.C. § 308 13

47 U.S.C. § 309(a) 6

47 C.F.R. § 73.658(e) 19

47 C.F.R. § 73.3597(a)(1) 16

Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes, Public Law No. 100-202, 101 Stat. 1329-31 (1987) 12

Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989, Public Law 100-457, 102 Stat. 2216-17 (1988) 12

Table of Authorities Continued

Page

Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990, Public Law 101-162, 103 Stat. 988 (1989) 12

Congressional Material

H.R. Conf. Rep. No. 765, 95th Cong., 2d Sess. 40 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2261 9,12

S. Rep. No. 689, 92d Cong., 2d Sess. (1972) 9

Congressional Research Service, *Minority Broadcast Station Ownership Broadcast Programming: Is There A Nexus?* (June 29, 1988) 9

Executive Order No. 12138, 44 Fed. Reg. 29637 (1979) 10

Executive Order No. 12426, 48 Fed. Reg. 24463 (1983) 10

Miscellaneous Material

Cable And Broadcasting Industry Equal Employment Opportunity Trend Report (1986) 21

Female Ownership of Broadcast Stations, the ELRA Group, Inc. (1982) 9

Women and Business Ownership, U.S. Dept. of Commerce (1986) 9,10

U.S. Small Business Administration, "Facts About Women Small Business Owners" 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN WOMEN IN RADIO AND TELEVISION, INC. IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

American Women In Radio and Television, Inc. ("AWRT") submits this brief *amicus curiae* in support of respondents, Federal Communications Commission, *et al.* All parties to this suit have given written consent to the filing of this *amicus* brief. Copies of such consents have been filed with the Clerk of this Court.

The question before this Court encompasses the validity of both the qualitative enhancement merit given by the Federal Communications Commission ("FCC") for minority ownership and the qualitative enhancement merit for female ownership in comparative licensing proceedings. Although the Court of Appeals for the District of Columbia Circuit held that the female enhancement merit was not determinative in this case and, thus, did not reach the issue of the constitutionality of such an enhancement, AWRT addresses its constitutionality herein.

INTEREST OF THE AMICUS CURIAE

American Women In Radio and Television, Inc., founded in 1951, is a national non-profit membership organization of professionals in the electronic media and allied fields. The members include women who hold ownership and management positions at broadcast stations, as well as women who are potential broadcast station owners.

The goals of AWRT include working to promote the entry, development, and advancement of women in the electronic media and allied fields as well as the expansion of programming and editorial views which reflect the diversity and sometimes unique perspective held or articulated by women. In furtherance of these objectives, AWRT has been a frequent participant in proceedings before the FCC and the courts, particularly those pertaining to equal employment opportunities and comparative licensing matters.

STATEMENT OF THE CASE

Amicus adopts the identification of constitutional provisions involved and the Statement of the Case as

set forth in the Brief of Federal Communications Commission.

SUMMARY OF ARGUMENT

The constitutionality of the female enhancement merit should not be addressed by this Court since it was neither determinative nor even dealt with below. If it is, however, the merit is valid if it serves an "important governmental objective" and is "substantially related to the achievement of those objectives." Given the Constitutional imperative of maximizing the exposure of voices and views in the marketplace of ideas, and that imperative's conflict with the inherent limitation of the broadcast spectrum, it can hardly be contended that the resolution of that conflict is not at least an "important governmental objective."

The use of a female enhancement merit in comparative applications before the FCC does not raise the normal gender-based concerns of applying fixed notions concerning the roles and abilities of males and females. Nor does it exclude or protect members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior. Rather, it recognizes the value of assuring that, in at least some cases, women's viewpoints are expressed to society at large.

First, it requires neither intensive fact gathering nor doctoral degrees to appreciate that, on at least some subjects, many women's views and perspectives on issues may be different from those of men. This determination does not rely on judgments of inferiority or superiority; it does not demand adherence to archaic beliefs or stereotyped views of either women or men; it does not call into play "protection," "hand-

icaps," or biases. It merely recognizes that there is likely to be a diversity of expression.

Second, there can be little doubt that the expression of women's views is more likely to occur where women are the owners and operators of broadcast stations as they are when the FCC awards enhancement merit. These owners are not mere figureheads—they can and will affect the presentation of views and programs broadcast.

Thus, where promotion of diversity of views is the governmental objective, there can be little doubt that the means selected, enhancing women's ownership and operational participation in broadcasting, is substantially related to the achievement of that objective. Indeed, it may well be the only means to reach that objective short of direct and unconstitutional governmental intervention into the content of broadcasts.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE FCC'S FEMALE ENHANCEMENT SHOULD NOT BE ADDRESSED.

As noted by the District of Columbia Court of Appeals in its opinion in this case, *Winter Park Commun., Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), the FCC determined that the outcome of this comparative licensing proceeding would not change even if no consideration were given to Respondent's five percent female participation. *Id.* at 352 n.5 (citing 3 F.C.C. Rcd. at 867 n.1). For that reason the Court of Appeals did not rule on the constitutionality of the FCC's female enhancement merit. *Id.* at 352-353 n.5.

Under circumstances where the issue raised would not affect the outcome of the case and where this

Court does not have any ruling of the lower court to review, this Court should decline to address or deliver an advisory opinion on the issue. If this Court chooses not to deal with this issue, the remainder of this brief need not be considered. However, in the event the Court determines to rule on the validity of the FCC's female enhancement, AWRT will now discuss the merits of this issue.

II. AWARDING ENHANCEMENT MERIT TO APPLICANTS PROPOSING OWNERSHIP BY FEMALES WHO WILL OCCUPY MANAGEMENT POSITIONS IS CONSTITUTIONAL.

A. The Female Enhancement Merit Complies With Due Process If It Serves An Important Governmental Objective And Is Substantially Related To The Achievement Of That Objective.

The issue addressed herein is whether the FCC's female enhancement merit policy violates the Fifth Amendment of the United States Constitution which provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law; . . ." U.S. Const. Amend. V. This Due Process Clause requires that the federal government guarantee its citizens equal protection of the laws. *E.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

Equal protection challenges to statutory or administrative classifications have been evaluated by this Court using varying tests. However, where a classification is based on gender, this Court has held that the classification must serve "important governmental objectives and must be substantially related to achievement of those objectives." *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976); *Heckler v. Mathews*, 465 U.S. 728, 744 (1984). Furthermore,

> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. . . ."

Id. (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (ellipses in original)). Analyzed against this standard, the female enhancement merit is constitutional.

B. Advancement Of A Diversity Of Viewpoints In The Limited Broadcast Spectrum Is Consistent With The First Amendment And Is An "Important Governmental Objective."

Congress, in enacting the Communications Act, delegated broad authority to the FCC to allocate broadcast licenses in the "public interest, convenience and necessity." 47 U.S.C. § 309(a). The Act does not define "public interest, convenience and necessity," but the Supreme Court has held that the term "public interest" includes many factors, including "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Because the radio spectrum is limited, the FCC must devise methods for choosing among the many who apply for licenses. *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (hereafter

"NBC"). Licensee selection must advance the First Amendment "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Thus, the FCC must select among potential licensees in a manner designed to encourage the expression of diverse viewpoints. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 860 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

In setting its licensing policies in accordance with the public interest standard mandated by Congress and the courts, the FCC has long and properly acted on the theory that the structural device of obtaining diversification of the ownership and control of mass media serves the public interest by promoting diversity of program and service viewpoints. Furthermore, because the First Amendment precludes content regulation by the federal government, structural regulation of the industry is the only means available to promote the FCC's compelling goal of advancing the public's First Amendment right to diverse information sources. Thus, in 1943, in *NBC*, the Supreme Court upheld the FCC's authority to adopt "chain broadcasting" rules to restrict the potential reach of a broadcast network. *NBC*, 319 U.S. at 226-227. In the four decades since that decision, both the courts and the Congress have consistently approved the FCC's reliance, in a variety of contexts, on structural regulation to promote the goal of maximizing the diversity of viewpoints available to the public.

The Supreme Court has also recognized the compelling justification behind the pursuit of diversity of ownership and control. In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), this

Court approved limitations on cross ownership of media and held that "the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *Id.* at 796. Likewise, the Court of Appeals for the District of Columbia Circuit has recognized the relationship between diversity of ownership and control and the First Amendment goal of diversity of viewpoints and ideas. Thus, in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), it confirmed the FCC's responsibility to

> seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint. . . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies.

Id. at 1213 n. 36 (citation omitted) (rejecting the FCC's effort to eliminate the diversification of ownership criterion from the factors considered in comparative hearings). *See also*, *Greater Boston*, 444 F.2d at 860; *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) ("TV 9").

In short, there is a long and widely recognized statutory and indeed Constitutional imperative to provide a diversity of views in this country. It is difficult to imagine that a mandate as deeply ingrained as this one could be downgraded to anything less than an "important governmental objective." Furthermore, it

is patent that expanded diversity ultimately reaches an impasse when it comes into conflict with the reality of the inherent limitations of the electronic spectrum available for broadcast communication. Again, it cannot reasonably be contended that the ability of the gatekeeper, the FCC, to resolve this conflict between increasing diversity of viewpoints and limited availability of spectrum within which to express them, is not an "important governmental objective."[1]

---

[1] Although the diversity rationale is more than sufficient to sustain the constitutionality of the enhancement factor, Congress, the courts and the FCC have repeatedly noted the historical discrimination against women. *See, e.g.*, S. Rep. No. 689, 92d Cong., 2d Sess. 6-9 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *Equal Employment Program*, 32 F.C.C.2d 708, 709 (1971). Congressional hearings considering the status of women in business were held in 1976, 1977, 1978, 1980 and 1984. *Women and Business Ownership*, U.S. Dept. of Commerce, at 129-133 (1986). Furthermore, a study commissioned by the FCC, *Female Ownership of Broadcast Stations*, the ELRA Group, Inc. (1982), found that while women represent more than half of the population of this country, they own only 2.8% of its television stations, 8.6% of its AM stations, and 9% of its FM stations. *Id.* at ii. *See also* Congressional Research Service, *Minority Broadcast Station Ownership Broadcast Programming: Is There A Nexus?* (June 29, 1988); H.R. Conf. Rep. No. 765, 95th Cong., 2d Sess. 40, reprinted in 1982 U.S. Code Cong. & Ad. News 2261.

At a time when, fostered by such factors as women's improved access to credit, the women-owned segment of the nation's business is growing twice as fast as the segment owned by men (U.S. Small Business Administration, "Facts About Women Small Business Owners"), and when many new broadcast stations have become available, it is appropriate to encourage the interest of women entrepreneurs in the broadcasting industry. This, in turn, will promote the public interest in having

C. The Female Enhancement Merit Is A Means Substantially Related To The Achievement Of The Objective.

The FCC's means to provide more diversity of viewpoints is the female enhancement merit awarded to applicants who place women owners in management positions. First, by affording a structural solution to increase diversity, this approach adopts both a widely utilized method and one which avoids entanglements with content regulation prohibited by the First Amendment. Second, by using the merit as merely one of a number of factors to evaluate the ultimate comparative award, the FCC minimizes any discrim-

---

access to diverse viewpoints.

In recognition of the need to assist women in overcoming the effects of discrimination and other obstacles to their economic equality, and of the national policy of developing the women-owned sector of the nation's business, in 1979, President Carter issued Executive Order No. 12138, citing Congressional findings recognizing the "many obstacles facing women entrepreneurs." Exec. Order No. 12138, 44 Fed. Reg. 29637 (1979). Among the requirements of this Order is that federal agencies "establish incentives to private business or business-related opportunities for women's business enterprise," an objective advanced by the positive impact of the recognition of female "merit" on the number of women-owned broadcast applicants. Similarly, in 1983 President Reagan issued Executive Order No. 12426, establishing the President's Advisory Committee on Women's Business Ownership. Exec. Order No. 12426, 48 Fed. Reg. 24463 (1983). Thus, there is ample evidence of the impact of historic discrimination against women on their role in business, and of the national policy designed to address this problem in order to realize the full potential of this segment of commerce. *See also Women and Business Ownership*, at 18-19, 21, 27, 32, 117-122 (discussing the existence and impact of discrimination against women in access to credit and of historical prejudice and social economic barriers faced by women).

inatory impact or effect. Third, the policy is efficacious in achieving the desired objective.

1. Structural Solutions Used By The FCC Are Familiar And Constitutionally Acceptable.

In its *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978), the FCC recognized that the First Amendment precludes it from directly mandating the programming decisions of broadcast licensees and declared that "affecting programming by means of increased minority ownership . . . avoids direct government intrusion into programming decisions." *Id.* at 981. The FCC thus concluded that it must employ structural means to attain its paramount policy objective of diversity of viewpoints and program sources in order to promote the First Amendment rights of the public without offending the First Amendment rights of broadcaster.

In *West Michigan Broadcasting Corp. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), the Court of Appeals for the District of Columbia Circuit expressly approved the grant of enhancement credit for minority ownership and control because it would promote diversity of information sources for the public. *Id.* at 614.[2]

Not only have the FCC and the courts approved the use of female enhancement merit in FCC com-

---

[2] *And see WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978); *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395-96 (1965); *TV 9*, 495 F.2d at 941 & n.2; and *cf.*, *National Organization for Women v. FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977) (FCC's equal employment regulations are "less intrusive on the First Amendment, for assuring that licensees provide fair and balanced coverage of news on women's issues").

parative licensing proceedings, Congress has approved and, in essence, mandated its use. Thus, in the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987), Congress specifically withdrew funding from any FCC effort to reexamine its female enhancement policy. Similar legislation was enacted in 1988 and 1989. *See Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-457, 102 Stat. 2216-17 (1988); *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Public Law 101-162, 103 Stat. 988 (1989).

Congress also endorsed the FCC's reliance on structural means of achieving diversity in its 1982 amendments to the Communications Act. Congress found that "the American public will benefit by having access to a wider diversity of information sources." H.R. Conf. Rep. No. 765, 95th Cong., 2d Sess. 40, 44-45 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2261, 2287. In enacting legislation authorizing lottery selection among competing license applicants (47 U.S.C. § 309(i)), the Congressional conferees expected "that this approach to enhancing diversity through such structural means [promoting ownership by underrepresented groups] will in turn broaden the nature and type of information and programming disseminated to the public." *Id.* at 44-45.

2. The FCC Examines A Variety Of Factors In Comparative License Proceedings.

In order to further understand the FCC's use of structural approaches to carry out its necessary role in comparative hearings and to appreciate the wide

variety of evaluative factors the FCC utilizes, it is useful to review briefly the overall comparative licensing scheme.

In selecting among mutually exclusive applications in a broadcast licensing proceeding, the FCC seeks to determine which of the various applicants will best serve the public interest.[3] In 1965, the FCC adopted a *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (hereafter, "*1965 Policy Statement*"), in which it set forth the criteria which, with some modifications, are still used in conducting comparative evaluations. As explained in the *1965 Policy Statement*, the two primary objectives toward which the comparative process is directed are: (a) the maximum diffusion of control of the media of mass communications, generally known as "diversification of control," and (b) the best practicable service to the public.

In weighing these two factors, the FCC has consistently held that diversification is the factor of primary significance. *Snake River Valley Television, Inc.*, 26 F.C.C.2d 380 (Rev. Bd. 1970); *Ramon Rodriquez et al.*, 4 F.C.C. Rcd 6817 (Rev. Bd. 1989). Under the diversification factor, the FCC considers both common control and less than controlling interests in other broadcast stations and media of mass communications. Media interests of an applicant's principals in the principal community to be served will normally be of most significance followed by other interests in the remainder of the service area. *1965 Policy State-*

---

[3] The FCC also examines the citizenship, character, financial, technical and other qualifications of applicants to operate a broadcast station. *See* 47 U.S.C. § 308.

ment, 1 F.C.C.2d at 394. Depending on the nature and extent of such interests, the applicants may receive "slight," "moderate," or "substantial" demerits. An applicant with no or less extensive demerits receives an overall "preference" under the diversification factor. *See, e.g., Richard P. Bott, III*, 4 F.C.C. Rcd 4924 (Rev. Bd. 1989).

The second primary factor is best practicable service to the public. One of the chief indicators used to evaluate this factor is integration of ownership and management. Under the "integration" concept, the FCC measures the extent to which owners will actively participate in, or be integrated into, the day-to-day management of the proposed station. The FCC computes an applicant's *quantitative* participation percentage by examining only the involvement of the voting shareholders (or general partners in a limited partnership) on the basis that non-voting principals have no managerial control over the operational activities of the corporation. *Stanly Group Broadcasting, Inc.*, 3 F.C.C. Rcd 5017, 5018-19 (Rev. Bd. 1988). The highest preference is awarded for full time "integration of stockholders [or general partners] exercising policy functions," *1965 Policy Statement*, 1 F.C.C.2d at 395, but part-time integration credit can also be awarded. *Omaha TV 15, Inc.*, 4 F.C.C. Rcd 730 (1988). In addition, the FCC looks at the type of position the integrated shareholder or general partner will hold[4] and the likelihood that the proposal will be

[4] Particular weight is given to certain managerial-level positions such as General Manager, Station Manager, Program Director, Director of News or Public Service Programming and Sales Manager. *See 1965 Policy Statement*, 1 F.C.C.2d at 395.

effectuated. *Stanly Group Broadcasting, Inc.*, 3 F.C.C. Rcd at 5019-20.

An "integration" proposal is also evaluated from a *qualitative* standpoint. Qualitative attributes that the FCC considers as enhancing an applicant's qualitative proposal include local residence, civic participation, broadcast experience and minority and female ownership. *1965 Policy Statement*, 1 F.C.C.2d at 395; *TV 9*, 495 F.2d at 941 nn. 1-2; *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 n.13 (1982). However, the qualitative factors cannot overcome a "clear" quantitative difference. *Stanly Group Broadcasting, Inc.*, 3 F.C.C. Rcd at 5019. *Van Buren Community Service Broadcasters, Inc.*, 87 F.C.C.2d 1018, 1022 (Rev. Bd. 1981). Broadcast experience has less significance as a qualitative enhancing factor than local residence because "experience generally confers only an initial advantage." *1965 Policy Statement*, 1 F.C.C.2d at 396. Local residence and civic activities are separate enhancement features. *See, e.g., Radio Jonesboro, Inc.*, 96 F.C.C.2d 1106, 1109 (Rev. Bd. 1984), *aff'd* 100 F.C.C.2d 941, 947 (1985); *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260 (1982), *aff'd sub. nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Minority and female ownership are considered "plus factors" to be weighed along with all other relevant factors in determining which applicant is to be awarded an integration preference. *TV 9*, 495 F.2d at 941 and n.2. Female ownership has less significance than either minority ownership or local residence. *Miracle Strip Communications, Inc.*, 4 F.C.C. Rcd 5064 (1989).

In addition to the diversification factor and integration factor, the comparative evaluation can also

include issues on proposed program service, past broadcast record, efficient use of frequency, auxiliary power and comparative coverage of each applicant's technical facility. *See generally 1965 Policy Statement*, 1 F.C.C.2d 393; *Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 F.C.C.2d 667 (196); *Vela Broadcasting Co.*, 2 F.C.C. Rcd 3663 (Rev. B 1987).

The FCC's comp ative evaluation varies from case to case depending upon the composition of the applicants and the weight received for each of the factors described above. Even where an applicant has substantial female ownership, it is by no means certain that the applicant will prevail. *See, e.g., Miracle Strip Communications, Inc.*, 4 F.C.C. Rcd at 5068.[5]

Thus, it is clear that the FCC's use of structural means to enhance diversity is a generally applied tool; not one simply aimed at creating favorable results for "disadvantaged" classes. Moreover, the female enhancement merit is clearly not determinative, but is one of a panoply of factors to be evaluated.

[5] In at least one respect, petitioner has seriously mischaracterized the nature of the FCC comparative hearing process. Petitioner raises the spectre of sham applications. However, such applications are usually exposed in the discovery process and, in any event, the FCC has recently taken steps to eliminate the possibility of shams. *See Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 F.C.C. Rcd 3853 (1989). According to petitioner, "[o]nce an award is made there is no assurance that the minority or female chosen will retain the permit, rather than sell to a non-minority group member, or a male." (Pet. Brief at p. 44). However, the FCC's rules prohibit an applicant who obtains a construction permit as the result of a comparative hearing from transferring the permit until one year after the applicant has commenced program tests on its facility. *See* 47 C.F.R. § 73.3597(a)(1).

Nor is the FCC's use of structural means to obtain the objective of diversity of women's views unique to the comparative hearing process. Thus, for example, in recognition of the significant underrepresentation of women in broadcasting and to address the specific issue of employment discrimination against women, the FCC in 1971 included women in its equal employment opportunity requirements. *Equal Employment Program*, 32 F.C.C.2d 708, 709 (1971). This Court, in *NAACP v. FPC*, 425 U.S. 662 (1976), noted that the FCC's equal employment opportunity requirements, which rely on the structural approach of reviewing employment statistics resulting from licensee implementation of equal employment policies rather than reviewing specific employment decisions, "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoint of minority groups." *Id.* at 670 n.7. In the employment context, therefore, this Court thus recognized the nexus between participation of all segments of the population in broadcasting and achievement of the goal of providing diverse viewpoints, as well as the FCC's responsibilities for fostering that goal.

3. The Female Enhancement Merit Substantially Relates To Achieving A Diversity Of Viewpoints

An analysis of recent Supreme Court cases suggests that the substantial relationship prong of the equal protection test implicates at least two facets of potential discriminatory classification. First, do preconceived and stereotypical views of classes underpin or

provide the justification for the means of dealing with the objective? If so, the means itself will be equally infected and unacceptable. Second, will the selected means be likely to accomplish the objective? If not, one must question the non-discriminatory impact and intent of the proposed solution. In this case, the female enhancement merit passes scrutiny.

Neither the objective of increasing the diversity of voices and viewpoints in the marketplace of ideas, nor the award of enhancement merit for applicants who use women in managerial positions as one factor in evaluating comparative applications, raises the normal gender-based concerns which have troubled this Court. *See Heckler*, 465 U.S. at 745. Neither the objective nor the award involves application of " 'old notions' and 'archaic and overbroad' generalizations about the roles and abilities of men and women." *Id.* (citations omitted). They do not "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior . . . ." *Id.* Rather, they recognize the value of assuring that, in at least some cases, women's viewpoints are expressed to society at large and made available to the marketplace of ideas.

First, it requires neither intensive Congressional fact-gathering nor doctorates in biology, genetics or psychology to appreciate that, on at least some subjects, many women's views and perspectives on issues may be *different* from those of men. This determination does not rely on judgments of the inferiority or superiority of those differing viewpoints; it does not demand adherence to archaic beliefs or stereotyped views of either women or men; it does not call into play "protection" or "handicaps" or prejudices

or biases. This does not require determining whether there is "women's programming," or a "women's-targeted audience," which bothered Judge Williams in his dissent in the court of appeals below. *Winter Park*, 873 F.2d at 358 (Williams, J. dissenting). It merely recognizes that there is likely to be diversity of expression.

Second, there can be little doubt that the expression of women's views is more likely to occur where, as here and in all cases in which the FCC awards enhancement merit, women are the owners and operators of broadcasting stations. These owners are not mere figureheads. They can and will affect the presentation of views and programs broadcast. FCC rules require licensees who are owners and operators to assume responsibility and be accountable for program content. 47 C.F.R. § 73.658(e); *Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (*en banc*); *Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976). One can hardly take seriously petitioner's suggestion that the use of limited partnerships funded, controlled and "comprised of 100 white males with one . . . female 'general partner'" will negate all female input into program content. (Pet. Br. at 44.)[6] This Court need not propound

[6] It is, of course, precisely *this* type of stereotyping—the poor women, helpless pawns to the powerful, law-subverting males—that this Court has been attempting to end. Furthermore, it is surprising in the extreme to have petitioner suggest that it is really that easy for white males to avoid the impact of the FCC female enhancement merit through sham applications. Petitioner's equal protection claim is much different if its only complaint is that it is being denied the ability to have a white male serve as a figurehead licensee.

constitutional rulings on the assumption that all potential licensees will be scofflaws.

Thus, where promotion of *diversity* of viewpoints, not preservation of inferior views, is the governmental objective, there can be little doubt that the means selected—enhancing women's ownership and operational participation in broadcasting—is substantially related to the achievement of that objective. Indeed, it may well be the *only* means to reach that objective short of direct governmental intervention in or regulation of the content of the broadcasts which would be patently violative of the First Amendment.

The female enhancement merit from its inception has been designed specifically to further the FCC's fundamental policy of encouraging diversity of viewpoints, not to remedy societal discrimination. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). While the FCC is required only to have a reasonable expectation, not certainty, that its policy will be effective (*TV 9*, 495 F.2d at 938), there is also empirical evidence that the presence of women in broadcast ownership and management is beneficial not only to female listeners, but also to the listening public in general by broadening the diversity of viewpoints presented. *Amicus* AWRT has, since 1975, granted National Commendation Awards each year to programs which present issues of particular importance to women or which present women in a positive and realistic light. An analysis of local radio and television station entries submitted for the 1986 awards showed that programs of these types have a substantial majority of women writers, producers, and reporter/hosts. The analysis found that, with respect to radio entries, women represented 84.2% of the writers,

58.5% of the producers, and 92.9% of the reporter/hosts. In contrast, according to the FCC's 1986 Cable and Broadcast Industry Equal Employment Opportunity Trend Report, in 1985 women filled only 29.8% of the total broadcast positions in the Officials and Managers and Professionals categories. FCC, *Cable and Broadcast Industry Equal Employment Opportunity Trend Report* (1986). This evidence shows that where women hold management roles with influence over content and treatment of issues, it can be anticipated that programs will feature a larger percentage of issues of concern to women, as well as provide a different viewpoint to all listeners and viewers. It confirms the reasonableness of the FCC's position that recognition of a female enhancement merit promotes diversity of viewpoints in the public interest. *See Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

Although utilizing different substantive Constitutional tests, prior opinions of Justices of this Court clearly support the validity of the FCC's female enhancement merit. The structural method of awarding qualitative enhancements is strikingly similar to the prototype "Harvard" admissions program approved by Justice Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271 n.1, 315-319 (1978) (Powell, J.); *id.* at 326 n.1 (Brennan, J., concurring) ("*Bakke*"). Under the factor of integration of ownership, gender-specific "merit" is just one of any number of potential FCC enhancement credits, just as ethnic background was one among many independent factors considered in terms of a university admissions policy considered in *Bakke*. The female merit is a "plus," not a quota or set-aside, and does not insulate the applicant from

comparison with all other candidates for the available broadcast license.[7] Rather, the female enhancement merit is awarded in recognition that female integrated ownership is a relevant factor when one applicant is compared with another in a licensing system designed to promote an overall broadcast licensee population reflecting and offering a diversity of viewpoints. Further, just as the existence of a special admissions program expands a student applicant pool (*Bakke*, 438 U.S. at 316-317), so too does the existence of the female enhancement merit encourage a broadening and expansion of the broadcast applicant pool, which both the courts and the FCC have recognized is in the public interest. *Crosthwait v. FCC*, 584 F.2d 550 (D.C. Cir. 1978); *Azalea Corp.*, 31 F.C.C.2d 561, 563 (1971). The program thus would comply with Justice Powell's model system. *See also, West Michigan*, 735 F.2d at 613-616 (finding the minority "merit" constitutional under the reasoning of *Bakke*).

The plurality opinion in *Bakke* concludes that if certain race-specific ends, such as achieving a more normally integrated student body, are compelling or even acceptable, then race-specific means are not automatically suspect. Justice Powell recognized diversity of students as a "constitutionally permissible goal" under the First Amendment because of the presump-

---

[7] Thus, the FCC system is not analogous to the 30% minority set-aside or quota system voided in *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706 (1989).

Furthermore, as a mere factor in the determination of those to whom new licenses will be issued rather than who must relinquish licenses, the FCC's award of enhancement merit does not raise the spectre of injuring innocent parties in the name of remedying past discrimination. *See Wygant*, 476 U.S. 267.

tion that such diversity would contribute to the robust exchange of ideas on the campus, an essential ingredient of higher education. *Bakke*, 438 U.S. at 311-312. To achieve this goal, Justice Powell found universities must be free to select those students who will most likely contribute to that marketplace of ideas. The analogy of promoting a diversity of viewpoints in society at large and considering special factors which are likely to contribute to that diversity is compelling.

Subsequently, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S. Ct. 1442 (1987), this Court addressed, in a Title VII "reverse" gender-discrimination affirmative action case, a program similar in its "plus factor" structure to the university admissions process in *Bakke* and the FCC comparative licensing process at issue here.

In *Johnson*, the Santa Clara Transportation Agency had voluntarily adopted an affirmative action plan for minorities and women to attain a balanced work force. The agency considered the sex of the applicant as one of many qualification factors under the plan which was intended to help promote women to positions within traditionally segregated job classifications.

This Court first found that consideration of the sex of the applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." *Id.* at 1452. Second, this Court considered whether the plan "unnecessarily trammeled" the rights of male employees or created an absolute bar to their advancement. *Id.* at 1455. Answering this question in the negative, this Court compared the affirmative action plan in *Johnson* to

the "Harvard Plan" approved by Justice Powell in *Bakke*. *Id.* The Court said "the Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Id.* (emphasis in original).

Although not decided on constitutional grounds (*id.* at 1446 n.2), Justice O'Connor, concurring in the judgment in *Johnson*, observed that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Id.* at 1461 (O'Connor, J., concurring).

Johnson demonstrates the permissibility of the enhanced factor selection approach, even in a situation where the intended objective is the increase of the diversity of employees as an end in itself. In the case at bar, however, the governmental purpose is to promote the First Amendment rights of the public at large which cannot be advanced more directly without violence to First Amendment imperatives.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Women in Radio and Television urges that if this Court chooses to examine the validity of the FCC's female enhancement merit that it find that the objective of increasing the diversity of viewpoints in the broadcast marketplace is an important governmental objective and that the female enhancement merit is a constitutional means intended substantially to achieve that objective.

Respectfully submitted,

RICHARD P. HOLME*
MIRIAM C. KIRCHER
DAWNEE H. GIAMMITTORIO
DAVIS, GRAHAM & STUBBS
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 822-8660

Attorneys for Amicus Curiae American Women in Radio and Television

**Counsel of Record*

March 6, 1990